United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

212

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,774

WESTMINSTER BROADCASTING CORPORATION,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

KPAL BROADCASTING CORPORATION and
R. R. MOORE CORPORATION,

Intervenors.

ON APPEAL FROM DECISION OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR APPELLANT

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BRIEF FOR APPELLANT

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The following issue is here presented for review:

Whether the Federal Communications Commission, by applying standards previously rejected by this court and improperly holding that Appellant had not raised a *Carroll*[1] issue, erred in granting without a hearing an application

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[1] Carroll Broadcasting Co. v. FCC, 103 U.S. App. D.C. 346, 258 F.2d 440 (1958).

for consent to the assignment of the license of radio station KPAL.

This case has not previously been before this court.

REFERENCE TO RULING

The ruling here under review is an October 5, 1970, decision of the Federal Communications Commission (FCC 70-1064), unofficially reported at 20 Pike & Fischer Radio Reg. 2d 367 and reproduced in the Joint Appendix at pp. 16-20.

STATUTES INVOLVED

This appeal involves Section 309(d) and (e) of the Communications Act of 1934, 47 U.S.C. § 309(d) and (e).

STATEMENT OF THE CASE

I. Background

This is an appeal by Westminster Broadcasting Corporation (Westminster), pursuant to Section 402(b)(6) of the Communications Act of 1934, 47 U.S.C. § 402(b)(6), of an October 5, 1970, decision of the Federal Communications Commission (Commission).

KPAL Broadcasting Corporation (KPAL), intervenor/assignor, is the licensee of radio station KPAL, Palm Springs, California. Westminster is the licensee of radio station KCMJ, Palm Springs, California.

The most recent owners of KPAL were Harry and Ruth Maizlish, husband and wife. Mrs. Maizlish died on December 29, 1968. Her husband died less than three months later on March 24, 1969. He had been the licensee's president, a director, and the owner of 85 percent of its stock. By letter dated April 17, 1969, the administrators of the estate of Mr. and Mrs. Maizlish requested authorization for KPAL to remain silent for a period of 90 days. Such authorization was granted by the Commission on April 25,

1969. An application for consent to an involuntary transfer of control of the licensee to the administrators was filed on May 19, 1969, and was granted on July 2, 1969. On July 16, 1969, the Commission extended the authorized suspension of operations through September 25, 1969, to permit filing and consideration of an application to assign station KPAL in settlement of the estate. Pursuant to subsequent authorization, KPAL has remained silent to date. (Petition to Deny, ¶¶ 3-4, App. 2)

KPAL filed an application for consent to the assignment of the license for station KPAL to R. R. Moore Corporation, intervenor/assignee, on September 10, 1969. Westminster timely petitioned for denial of that application on November 13, 1969. Its petition *inter alia*, raised a *Carroll*[2] issue, asserting that the Palm Springs market did not have the capacity to support all existing broadcast stations and that the assignment of KPAL's license, leading to the reactivation of the station, would be contrary to the public interest. Responsive pleadings were subsequently filed in connection with the petition to deny. On April 7, 1970, KPAL filed an application for authority to change the site of its transmitter.[3]

On October 5, 1970, the Commission granted without a hearing the application for assignment of the license of KPAL and the related application for relocation of KPAL's transmitter site. The Commission simultaneously denied Westminster's petition to deny the assignment on the grounds, *inter alia*, that Westminster had failed to meet the economic criteria of the *Missouri-Illinois*[4] case, and had

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[2]See Carroll Broadcasting Co. v. FCC, 103 U.S. App. D.C. 346, 258 F.2d 440 (1958).

[3]This application was related to one of the issues raised in Westminster's petition to deny—the absence of a transmitter site for KPAL—but is not of direct concern to the issues raised in this appeal.

[4]Missouri-Illinois Broadcasting Co., 3 Pike & Fischer Radio Reg. 2d 232 (1964).

failed to demonstrate how alleged economic impact would adversely affect the public interest.[5]

On November 4, 1970, Westminster noted its appeal of that decision to this court. Westminster also petitioned the Commission to stay the effectiveness of its decision *pendente lite*. The Commission denied Westminster's motion for stay on December 16, 1970.[6] A motion for stay subsequently filed in this court on December 23, 1968, was denied on January 18, 1971.

II. Statement of Facts

A. *The Palm Springs Market*

Palm Springs is essentially a small winter resort community located nearly 100 miles east of Los Angeles, with a population of 20,100 permanent residents. Three AM stations, KCMJ, KPAL, and KDES, have been assigned to Palm Springs. One FM station, KGEC, is located there. KGEC is affiliated with KDES and duplicates its programming. Two nearby AM stations and one affiliated FM station sell Palm Springs as their primary market, and are so listed in Standard Rate and Data. They are KWXY and KWXY-FM, assigned to Cathedral City, and KCHV, assigned to Coachella. Since October 1968 Palm Springs also has had two operating UHF television stations, KMIR-TV and KPLM-TV. Of considerable additional importance, a well-entrenched CATV system seriously erodes the ability of local broadcast stations to attract and hold the audiences upon which their revenues inevitably are based. The Palm Springs CATV system is the 40th largest in the country, with 10,300 CATV subscribers,

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[5]KPAL Broadcasting Corp., FCC 70-1064 released October 5, 1970 (hereinafter sometimes referred to as "October 5, 1970 decision") (App. 16-20).

[6]KPAL Broadcasting Corp., FCC 70-1287, released December 16, 1970 (sometimes referred to herein as "December 16, 1970 decision") (App. 21-25).

and carries the programming of both local television stations. five FM stations, and ten outside television stations. Finally, there are two local newspapers, the *Desert Sun* and *The Daily Enterprise*, plus the *Palm Springs Life* magazine, which also compete vigorously for advertising dollars in Palm Springs. (Petition to Deny, ¶¶ 8-13, App. 2-4)

Such a competitive market structure has had its predictable consequences. Beginning with the year 1966, the Commission's annual AM-FM broadcast financial data releases have permitted analysis of the financial straits of the three AM stations assigned to Palm Springs. In 1966 the three Palm Springs stations had revenues of $386,380, expenses of $517,861, and resulting aggregate losses of $131,481. Of the 72 communities with three or more radio stations within standard metropolitan statistical areas, only 12 showed aggregate losses. Of those 12, Palm Springs had the second highest loss. (Petition to Deny, ¶ 15, App. 4.)

In 1967 the Palm Springs stations' revenues were $378,-488, expenses $557,285, and resulting aggregate losses $178,797. Again, Palm Springs showed the second highest loss for three-or-more station communities within standard metropolitan statistical areas. (Petition to Deny, ¶ 16, App. 4-5.)

In 1968 revenues were $408,388, expenses were $573,699 and resutling aggregate losses were $165,311. For 1968, only 10 of 81 three-or-more station communities in standard metropolitan statistical areas showed aggregate losses, and this time Palm Springs' losses were the greatest by a considerable margin. (Petition to Deny, ¶ 17, App. 5.)

Balance sheets submitted by the three AM licensees with their renewal application have reflected the adverse economic situation in the Palm Springs market. KPAL's 1962 renewal application showed a current loss of $12,601 for the fiscal year ending on June 30, 1962, and a total balance sheet deficit of $67,519. (Petition to Deny, ¶ 20, App. 5-6.) KPAL's 1965 and 1968 renewal applications showed cur-

rent losses of $16,571 and $19,420, and total balance sheet deficits of $115,438 and $172,804, respectively. (Petition to Deny, ¶¶ 22-23, App. 6-7.) KDES's 1968 renewal application showed a current loss of $69,483 for the ten months ending on June 30, 1968, and a total balance sheet deficit of $137,675. KCMJ's 1965 and 1968 renewal applications showed total balance sheet deficits of $93,875.08 and $165,906.70, respectively. (Petition to Deny, ¶ 24, App. 7.)

Thus all three AM stations licensed to the community and the FM station affiliated with one of them were consistently losing substantial sums of money through 1968. Since that time, conditions have deteriorated. In October 1968, two new UHF television stations entered the market and began making serious inroads on the revenues of the four operating AM stations and two operating FM stations which are dependent upon the Palm Springs market for their income. This remains true notwithstanding the fact that both television stations are themselves losing substantial sums. (Petition to Deny, ¶ 25, App. 8; Reply to Opposition to Petition to Deny, ¶ 15, App. 12.)

Palm Springs is clearly a genuinely unique market. That all broadcast stations relying on Palm Springs for revenues have been losing money over a significant period of time conclusively demonstrates that the market does not have the revenue capacity to support all the stations assigned.

The impact of this market structure has ultimately been borne by the public. For example, the turnover of radio station personnel has been extremely high because of the salary limitations imposed by the station's sustained operating losses. This turnover has had the effect of limiting the quality of station personnel, which in turn has naturally limited the quality of broadcast service. More specifically, sustained losses have limited the ability of Westminster to provide the level of public service which a viable station could present. But for these losses, Westminster could and would improve its personnel, equipment, and public service

broadcasting. (Reply to Opposition to Petition to Deny ¶ 19, App. 14-15.)

In view of the above data, which was derived when KPAL was on the air, Westminster argued in its petition to deny the assignment application that reactivation of the station by a new owner would be detrimental to the public interest.

B. The Commission's Decisions

On October 5, 1970, the Commission granted the assignment application and denied the petition to deny. In confronting the *Carroll* issue, the Commission did not discuss or analyze the facts and inferences which Westminster had presented. Rather, the Commission stated that because Westminster had failed to meet the economic criteria set forth in *Missouri-Illinois Broadcasting Co.*, 3 Pike & Fischer Radio Reg. 2d 232 (1964), and had failed to show how its alleged economic injury would be detrimental to the public interest, it had failed to raise a *Carroll* issue. (October 5, 1970 Decision, ¶¶ 10-11, App. 19-20.)

Westminster next noted a timely appeal of that decision in this court, and petitioned the Commission for a stay of the decision *pendente lite*. In its motion for stay, Westminster asserted that reversal was likely on appeal because the Commission had committed clear error by exclusively relying on the application of standards previously rejected by this court.

The Commission denied the motion for stay in a decision released on December 16, 1970. The Commission held, *inter alia*, that reversal on appeal was not likely. However, in reaching this conclusion on December 16, 1970, the Commission neither discussed nor relied upon the grounds for rejecting the *Carroll* issue which it had expressed in its decision of October 5, 1970, from which this appeal is taken. Instead, the Commission compared Westminster's showing to that of the petitioner in *Folkways Broadcasting Co. v. FCC*, 126 U.S.App.D.C. 123, 375 F.2d 299 (1967), and

concluded anew that Westminster had failed to raise a *Carroll* issue. The Commission this time supported its ruling by holding that Westminster had failed to allege what Folkways had alleged; and that Westminster's arguments involved an extension of the *Carroll* doctrine beyond the limits of what the Commission asserted to be its underlying purposes—the prevention of diminution or destruction of existing service. (December 16, 1970 Decision, ¶¶ 4-5, App. 22-23.)

ARGUMENT

I. THE COMMISSION ERRED IN REJECTING WESTMINSTER'S *CARROLL* SHOWING BY RELYING EXCLUSIVELY ON STANDARDS WHICH WERE PREVIOUSLY REJECTED BY THIS COURT.

Section 309(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(d), prohibits the Commission from granting an application without a hearing if a substantial and material question of fact has been raised or if for any reason the Commission is unable to determine that a grant of the application will serve the public interest, convenience and necessity. If a substantial question has been raised, the Commission must hold a hearing pursuant to Section 309(e) of the act, 47 U.S.C. § 309(e).

Originally, the Commission took the position that in determining whether an application for a broadcast license would serve the public interest, it did not have the authority to consider the effect of legal competition which the grant of such an application might create. The Commission considered such competition immaterial to the licensing process because "Congress had determined that free competition shall prevail in the broadcast industry." See *Carroll Broadcasting Co. v. FCC*, 103 U.S. App. D.C. 346, 348, 258 F.2d 440, 442 (1958).

This interpretation of the Commission's statutory obligations was held to be incorrect by this court in the *Carroll Broadcasting* case, *supra*. The court stated:

> It was settled by the Sanders Brothers case [citing *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 473 (1940)] that economic injury to an existing station is not a ground for denying a new application. But the Court, it seems to us, made clear the point that economic injury to a licensee and the public interest may be different matters.
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> * * * * *
>
> Thus, it seems to us, the question whether a station makes $5,000, or $10,000, or $50,000 is a matter in which the public has no interest so long as service is not adversely affected; service may well be improved by competition. But, if the situation in a given area is such that available revenue will not support good service in more than one station, the public interest may well be in the licensing of one rather than two stations. To license two stations where there is revenue for only one may result in no good service at all. So economic injury to an existing station, while not in and of itself a matter of moment, becomes important when on the facts it spells diminution or destruction of service. At that point the element of injury ceases to be a matter of purely private concern.
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> [103 U.S. App. D.C. at 348-49, 258 F.2d at 442-43.]

From this case comes the term "*Carroll* issue," which refers generally to the question of whether a contested application will not serve the public interest, convenience and necessity because of the economic consequences which a grant of the applicant will create.

In *Southwestern Operating Co. v. FCC*, 122 U.S. App. D.C. 137, 351 F.2d 834 (1965), and *Folkways Broadcasting Co. v. FCC*, 126 U.S. App. D.C. 123, 375 F.2d 299 (1967), this court twice reversed the Commission for improperly refusing to consider *Carroll* issues which had been raised therein. These cases reaffirm what can be derived from the language of the *Carroll* case quoted above—that in order to raise a *Carroll* issue, a petitioner has the burden of raising questions of fact on two points:

(1) that there are insufficient revenues in the market to support all stations assigned including the contested station; and (2) that the adverse economic consequences of a grant under such a market structure will result in an adverse effect on service to the public.

In the instant case, Westminster pleaded evidence under both of these points. The adequacy of that evidence was rejected by the Commission on improper grounds.

A. The Commission's Exclusive Reliance on the *Missouri-Illinois* Standards in Considering Westminster's Economic Impact Showing Was Clear Error.

In its petition to deny, Westminster presented the Commission with financial data concerning the effects of competition amongst the broadcast stations in the Palm Springs market. This data, which was not disputed, demonstrated that all stations in the market had been and were losing substantial sums of money, proof that the market did not have the capacity to support all those stations.[7]

Without even discussing the financial and competitive factors which had been presented to it, the Commission concluded that Westminster's *Carroll* showing was inadequate because its economic data fell "far short of the specific criteria set forth in the *Missouri-Illinois*[8] opinion."[9] This statement was the exclusive reason given for its summary rejection of Westminster's argument that a grant of the KPAL assignment application would have an adverse economic impact on the Palm Springs market.

In *Folkways Broadcasting Co. v. FCC*, 126 U.S. App. D.C. 123, 375 F.2d 299 (1967), this court reversed a Com-

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[7]Petition to Deny, ¶¶ 8-25, App. 2-8; Reply to Opposition to Petition to Deny, ¶ 15, App. 12; see Argument at pp. 15-17, *infra*.

[8]Missouri-Illinois Broadcasting Co., 3 Pike & Fischer Radio Reg. 2d 232 (1964).

[9]October 5, 1970 Decision, ¶ 10, App. 19.

mission decision, *Harriman Broadcasting Co.*, 2 F.C.C. 2d 320 (1966), in which a *Carroll* issue had been rejected on precisely the same exclusive grounds as in the instant case. In *Harriman*, the Commission's reason for denying a request for a hearing on a *Carroll* issue was the petitioner's failure to supply the information set forth in the *Missouri-Illinois* opinion.[10] The court held "that the reasons given for the rejection of the *Carroll* hearing are not satisfactory."[11]

In *Southwestern Operating Co. v. FCC*, 122 U.S. App. D.C. 137, 351 F.2d 834 (1965), the court also reversed the Commission on this same point and ruled that a petitioner's failure to comply with the Commission's *Missouri-Illinois* requirements "does not conclude him on the question of whether those pleadings already contained information of such a nature as to entitle him to an evidentiary hearing."[12] Regardless of a petitioner's compliance with the *Missouri-Illinois* pleading standards, the Commission must independently ascertain "whether the papers filed with the Commission . . . raised substantial and material issues of fact which should [be] exposed to the give-and-take of an evidentiary hearing."[13]

The Commission's action in the instant case was in direct conflict with the holdings in *Folkways* and *Southwestern Operating*. By relying exclusively on the *Missouri-Illinois* criteria, and by failing to analyze the economic data contained in Westminster's petition to deny, the Commission committed clear error.

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[10] 2 F.C.C.2d at 325-26.

[11] 126 U.S. App. D.C. at 129; 375 F.2d at 305.

[12] 122 U.S. App. D.C. at 140, 351 F.2d at 837.

[13] *Id.*

B. The Manner in Which the Commission Rejected Westminster's Public Interest Showing Was Similarly Improper.

In addition to summarily rejecting the economic injury argument, *supra*, the Commission held that Westminster failed to demonstrate how such economic injury would be detrimental to the public interest. (October 5, 1970 Decision, ¶ 11, App. 19-20.) This conclusion disregarded the record.

Aside from alleging that consequences adverse to the public interest necessarily result from sustained operating losses being suffered by *all* market stations, Westminster specifically alleged that such losses were responsible for the high turnover rate among station personnel, to the detriment of service to the public. Westminster further stated that sustained losses limited KCMJ's capability of providing public service programming. Westminster assured the Commission that any increase in its revenues would be used to upgrade KCMJ's "personnel, equipment, and public service programming."[14] Such representations were sufficient to meet Westminster's burden.

The Commission critically commented that Westminster did "not indicate how many of its public affairs programs would be cut, curtailed or shifted, or in fact, how its total program format or public service performance would be changed or affected as a result of the grant of [the assignment] application." (October 5, 1970 Decision, ¶ 11, App. 19-20.) But such specificity was not required.

In the *Folkways* case, this court stated:

> To require a specific advance showing that a particular program would be abandoned should the economic injury ensue would be to force an advance decision where some latitude should be left to management. *The question is whether there would be degradation of public service resulting from the*

[14]Reply to Opposition to Petition to Deny, ¶ 19, App. 14-15.

> *necessary abandonment of a program or programs within a range of programs some of which would have to be abandoned.* Exposition of the matter by a hearing should not be denied simply because a petitioner has not specified the exact program the alleged loss would cause to be abandoned.
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> [126 U.S. App. D.C. at 128-9, 375 F.2d at 304-5.] (Emphasis added.)

Expressly relying on this language in *Folkways*, Westminster argued to the Commission that a requirement for more specific allegations concerning impact upon programming was unnecessary and would constitute a pointless elevation of form above substance.[15] Moreover, Westminster's reference to the impact of a grant on KCMJ's "public service programming" was sufficient to meet the "range of programs" standard laid down by this court in *Folkways, supra.*

In *Folkways*, the petitioner had alleged curtailment of "public service programs," 126 U.S. App. D.C. at 128; 375 F.2d at 304. This court held that language to be sufficiently descriptive to meet petitioner's burden. A fortiori, the phrase "public service programming" is sufficient.

Having been sufficiently specific in its description of the range of programs which would be adversely affected by a grant of the KPAL application, Westminster was not obligated to plead any further harm to the public interest in order to raise a *Carroll* issue. The petitioner in *Southwestern Operating*, after describing the economic injury that would result from a grant of the contested application, alleged only that ". . . it almost inevitably would have to abandon some of its uncompensated local programming."[16] In requiring a hearing in *Southwestern Operating*, the court necessarily held such allegations sufficient to tie private economic injury to the public interest and to meet the

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[15] See Reply to Opp. to Pet. to Deny, ¶¶ 16-20, App. 12-15.

[16] 122 U.S. App. D.C. at 139; 351 F.2d at 836.

burden for raising a *Carroll* issue. Westminster's allegations were no less sufficient.

In holding that Westminster had not demonstrated how its economic injury would be detrimental to the public interest, the Commission further disregarded this court's pronouncements in *Folkways* and *Southwestern Operating* and committed clear error.

II. THE COMMISSION'S DECISION OF DECEMBER 16, 1970 IN DENYING WESTMINSTER'S MOTION FOR STAY DID NOT CORRECT ITS PREVIOUS ERROR.

A. The Decision of December 16, 1970 Cannot Be Construed as a Modification of the October 5, 1970 Decision Here Under Appeal.

In its December 16, 1970 decision denying Westminster's motion for stay, the Commission deviated from the grounds upon which it had originally rejected applicant's *Carroll* showing. In refusing to stay its action, the Commission for the first time analyzed Westminster's showing in comparison to the facts of the *Folkways* case, but held that the sufficiency of Westminster's proof did not meet that of the petitioner/appellant in *Folkways*. The Commission further decided that, by alleging that a grant to KPAL would prevent the improvement of KCMJ's public service programming rather than force diminution or destruction of its existing programming, Westminster was requesting an extension of the *Carroll* doctrine beyond the purpose for which the Commission asserted the doctrine was intended. The Commission therefore concluded that Westminster would not prevail upon appeal. In reaching this conclusion, the Commission ignored the reasons it had given in its October 5, 1970 decision for rejecting a *Carroll* issue. (December 16, 1970 Decision, ¶¶ 4-5, App. 22-23.)

Under appeal here is the Commission's decision of October 5, 1970. No party petitioned the Commission to recon-

sider or modify that decision.[17] The Commission did not choose to modify the decision by reconsideration on its own motion within 30 days of the issuance thereof as prescribed by its own rules.[18] Those procedures are the only ones available under the Communications Act of 1934, 47 U.S.C. §§ 1.1-1.1251, for modification of a Commission decision prior to judicial review.

Westminster's motion to the Commission for a stay of the October 5, 1970 decision *pendente lite* was not a request for reconsideration. The Commission's decision of December 16, 1970 denying the motion for stay cannot be construed, therefore, as a reconsideration of its previous decision. The October 5, 1970 decision under appeal has never been properly modified, although it is based upon *Carroll* standards which clearly have been rejected by this court. See Argument, *supra*, pp. 10-14. Since the Commission committed reversible error in that decision, this court must vacate the grant of KPAL's assignment application and remand the case to the Commission.

B. Westminster Raised Substantial and Material Questions of Fact Under *Carroll* To Require a Hearing on the KPAL Assignment Application.

In addition to its procedural deficiencies, the Commission's December 16, 1970 decision is in error on the merits of the issue at hand. Westminster has raised a *Carroll* issue.

In the *Carroll* case this court stated that the initial concern is not whether there will be more competition resulting in lower station earnings, but rather whether available revenue will support good service from the stations

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[17]See Section 405, Communications Act of 1934, 47 U.S.C. § 405; Section 1.106 of the Commission's Rules and Regulations, 47 CFR § 1.106.

[18]Section 1;108 of the Commission's Rules and Regulations, 47 CFR § 1.108.

involved.[19] Thus the threshold question with respect to a *Carroll* issue is whether there are sufficient revenues in the market to sustain all stations licensed and seeking to be licensed there.

The Commission itself must have initially understood this question in setting forth its *Missouri-Illinois* requirements for the submission, by a petitioner seeking to raise a *Carroll* issue, of data on businesses, total retail sales, and total advertising revenue potential in the market under consideration.[20] Such data is relevant to a *Carroll* issue only insofar as inferences can be drawn as to the revenue capacity of the market. But such data is not necessarily the only means of demonstrating the inadequacy of a market's revenue capacity. *Folkways Broadcasting Co. v. FCC, supra; Southwestern Operating Co. v. FCC, supra.*[21]

In the instant case, it was not necessary to introduce indirect economic evidence from which inferences on market revenue capacity could be derived. Unlike the typical *Carroll* situation in which objection is raised to the licensing of a station which has never been on the air, there was here no need to speculate on the economic consequences stemming from the activation of KPAL. After describing the relatively large number of media competitors serving the small and isolated Palm Springs market, Westminster introduced uncontroverted evidence that, *with KPAL on the air*, all stations in the market including KPAL had lost substantial sums of money over a period of several years. And Westminster explained that the introduction of two new television stations had further reduced available revenues since the years for which economic data had been recited.[22]

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[19] 103 U.S. App. D.C. at 349; 258 F.2d at 443.

[20] See 3 Pike & Fischer Radio Reg. 2d at 235.

[21] See Argument *supra* at pp. 9-11.

[22] See Petition to Deny, ¶¶ 8-25, App. 2-8; Reply to Opposition to Petition to Deny, ¶ 15, App. 12.

Thus Westminster presented direct and uncontroverted proof that the Palm Springs market does not have the revenue capacity to support all stations assigned if KPAL is included. The threshold requirement for a *Carroll* issue was met.

Westminster also satisfied the second aspect of adequately requesting a hearing on a *Carroll* issue—tying revenues to service in the public interest. Westminster's showing on this point was entirely consistent with the standards of adequacy accepted by this court in *Folkways* and *Southwestern Operating*. See Argument, *supra*, at pp. 12-14.

In its December 16, 1970 decision denying the motion for stay *pendente lite*, the Commission added some new findings to its previous rationalization for rejecting Westminster's public interest showing. The Commission stated:

> In the case before us, except for a showing that all stations in Palm Springs are operating at a loss, KCMJ's showing is limited to conclusionary allegations. Rather than a showing that there would be "degradation of public service" resulting from abandonment of *any* programs, we have the speculative assertion that increased revenues (presumably resulting from the expected demise of KPAL) will enable KCMJ to upgrade its public service programming. This is certainly not a sufficient showing to require an evidentiary "Carroll" hearing, and moreover, involves an extension of the doctrine beyond the limits of its underlying purposes, viz., to prevent diminution or destruction of existing service.
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> [December 16, 1970 Decision, ¶ 5, App. 23.]

The Commission is in error on the merits.

Westminster's allegation that insufficient revenues caused a high rate of personnel turnover to the public's detriment (Reply to Opposition to Petition to Deny, ¶ 19, App. 14-15) was supported by the affidavit of an officer of West-

minster with knowledge of the facts.[23] It should have been regarded as a statement of fact, and not either "conclusionary" or "speculative." Westminster's commitment to use increased revenues to improve personnel, equipment and public service programming was also supported by that affidavit. It, too, was neither "conclusionary" nor "speculative."

As for the statement that the underlying purpose of the *Carroll* doctrine is to prevent diminution of destruction of *existing* service, the Commission reads *Carroll* too narrowly. In establishing the *Carroll* doctrine, this court stated that "economic injury to an existing station, while not in and of itself a matter of moment, becomes important when on the facts it spells diminution or destruction of service." *Carroll Broadcasting Co. v. FCC*, 103 U.S. App. D.C. at 349, 258 F.2d at 443. It is important to note that the court discussed the issue in terms of economic injury to an "existing station" and not to "existing service," and in terms of the destruction of "service" in general and not of "existing service."

The underlying purpose of the *Carroll* doctrine is of course to protect the public interest. The public interest is not necessarily limited to preservation of the existing level of service. The public may be as much injured by the inability of a station to improve public service programming which has been kept at a less than optimum level because of an overpopulation of stations in the market (e.g., Palm Springs) as by the necessary diminution of a station's existing service in a market where an entirely new station is about to enter the market (e.g., Harriman, Tennessee—see *Folkways Broadcasting Co. v. FCC, supra.*) The previous operation of KPAL has in effect already diminished the public service programming of KCMJ by prohibiting such

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[23] Affidavit of Morris H. Bergreen, President of Westminster Broadcasting Corporation, dated January 22, 1970 and filed with the Commission on January 26, 1970.

service from being expanded in quantity and quality to what it should be in a viable market. It is entirely within the scope and purpose of the *Carroll* doctrine to consider adverse consequences which reactivation of KPAL will have, among them being a continued limitation on the public service programming of KCMJ.

The question here is not whether the Commission should have denied the KPAL assignment application. The question is whether, under the *Carroll* doctrine, Westminster raised sufficient and material questions of fact to prevent a finding, without a hearing, that a grant of the application would serve the public interest, convenience and necessity. See Section 309(d) and (e) of the Communications Act of 1934, 47 U.S.C. § 309(d) and (e). Westminster has manifestly done so. It has met its burden under both aspects of a *Carroll* showing. It has demonstrated that Palm Springs does not have the revenue capacity to sustain all existing stations in the market plus KPAL, and that under those circumstances the economic consequences of a grant of the KPAL application will have an adverse effect on the public interest.

By summarily rejecting Westminster's showing, the Commission has misread *Carroll*, and disregarded the *Folkways* and *Southwestern Operating* cases. A grant of the application without a hearing on the *Carroll* issue was reversible error.

CONCLUSION

For all the foregoing reasons, the Commissions's decision of October 5, 1970 should be reversed. The Commission's grant of the application for assignment of license of radio station KPAL from KPAL Broadcasting Corporation to R. R. Moore Corporation should be vacated, and the case remanded to the Commission for further proceedings not inconsistent with this court's opinion.

Respectfully submitted,

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Appellee,

KRAG BROADCASTING CORPORATION and
[illegible],
Intervenors.

ON APPEAL FROM AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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Washington, D. C. 20554

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,774

WESTMINSTER BROADCASTING CORPORATION,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

KPAL BROADCASTING CORPORATION and
R. R. MOORE CORPORATION,
Intervenors.

ON APPEAL FROM AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR APPELLEE

ISSUES PRESENTED *

The Federal Communications Commission granted without hearing standard broadcast Station KPAL's assignment application and denied Westminster's (KCMJ) petition to deny. The issues presented are:

(1) Whether Westminster may as a matter of law assert a Carroll issue during a license transfer proceeding.

(2) Assuming that a Carroll issue lies, whether the Commission's judgment that a sufficient factual showing had not been made was unreasonable.

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* This case has not previously been before this Court, except insofar as appellant's motion for stay was denied by order of January 18, 1971.

COUNTERSTATEMENT

Westminster Broadcasting Corporation (Westminster), licensee of Radio Station KCMJ, Palm Springs, California, requests that this Court reverse and remand for further proceedings the Commission's order[1/] authorizing assignment of Radio Station KPAL, Palm Springs, California, from KPAL Broadcasting Corporation (KPAL)[2/] to R. R. Moore Corporation (Moore).[3/]

KPAL's license was first granted in 1954, has without exception received uncontested regular renewals since that time, and was last renewed in February, 1969, for a full three-year term ending December 1, 1971. (A. 19).

KPAL, on April 17, 1969, notified the Commission of the death of its President, director and principal stockholder, Mr. Harry Maizlish, and requested that the Commission authorize that station to remain silent for a period of

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1/ 20 Pike & Fischer, R.R. 2d 367 (1970) (A.16-20); motion for stay denied, 26 F.C.C. 2d 754 (1970) (A. 21-25).

2/ Effective February 9, 1971, KPAL's call letters were changed to KSPI.

3/ KPAL and Moore are intervenors herein.

90 days. Pursuant to continuing authorizations it has remained silent pending the conclusion of the present assignment proceeding. On February 26, 1971, authority was granted to remain silent through May 10, 1971, pending construction at a new site.

On May 19, 1969, KPAL filed an application seeking approval of the involuntary transfer of control of KPAL from Harry Maizlish to Leonard Maizlish and Stephen Maizlish, administrators of the assignor's estate. The application was granted on July 2, 1969 and the administrators were instructed to consummate the transfer within 45 days and to notify the Commission promptly. Transfer was consummated on July 7, 1969.

On September 22, 1969, KPAL filed the assignment application which gave rise to the present appeal. KPAL sought to assign its license to Moore, reciting that the deaths of Mr. and Mrs. Harry Maizlish have deprived the licensee of the knowledge and efforts of those most intimately concerned with the assignor's successful

operation of the licensee. Having no broadcast experience and desiring to satisfy the assignor's creditors, the administrators of the estate apparently thought it best to sell Station KPAL to one who had the resources and ability to operate it in the public interest.

On November 17, 1969, Westminster filed a "Petition to Deny" KPAL's assignment application. (A.1-11). In its "Preliminary Statement" Westminster, licensee since 1961 of Station KCMJ, set forth its requested relief: "It is contended herein not merely that the license in question should not be conveyed to the assignee, but moreover that the license should not be conveyed to anyone." (A. 1). Westminster admitted that "such relief has not been afforded by the Commission in the past." (A.1).

Westminster predicated its relief on three contentions: (1) that since all Palm Springs "stations" 4/ collectively

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4/ Palm Springs has three AM broadcast stations: KCMJ, KDES, and KPAL; one FM station, KGEC; and two UHF television stations. There is also a CATV system with 10,300 subscribers.

are economically unable to provide a truly satisfactory level of local public service programing . . .," and "are losing substantial sums of money nonetheless," (A. 4). substantial and material questions of fact are raised to preclude a grant of KPAL's application without a hearing; (2) that KPAL does not have a transmitter site which may be used, (A. 11); and (3) that KPAL is "apparently bankrupt" and is selling a naked unuseable license, (A.11). Westminster did not quarrel with assignee Moore's legal or financial qualifications.

In its Orders granting KPAL's application and denying Westminster's "Petition to Deny" and "Motion for Stay," the Commission considered and rejected each of Westminster's arguments concluding that "there are no remaining unresolved substantial and material questions of fact. We find the assignee is fully qualified and that a grant of the [KPAL] application will serve the public interest, convenience, and necessity." (A. 20). Westminster accepted without appeal the Commission's resolution of both the site issue and the issue concerning the assignor's financial condition.

Westminster's only contention on appeal is that the

Palm Springs market cannot economically support all three of its standard broadcast stations and that "considerations of the public interest, convenience and necessity will be served best by not having a new purchaser put the now-silent KPAL back on the air, but by having it remain off the air."[5/] (A.1). Westminster statistically detailed an aggregate loss of revenue for the three AM stations in the Palm Springs market beginning in 1966. (A. 4-8). It alleged that the net loss figure for KPAL in 1962 prompted Maizlish "to demonstrate both his ability and his willingness to continue to operate the station despite such losses " (A. 6); and "that in licensing stations to Palm Springs in the past, the Commission has been short-sighted in granting applications as long as someone seemed able and willing to justify whatever losses had to be incurred to keep the station on the air." (A. 8-9). Stating that a programming analysis of KCMJ, KDES, or KPAL was "neither appropriate nor necessary," (A. 10), it alleged that market facts "reveal the inevitability of the fact that the public service programming of the Palm Springs stations has suffered by virtue of the losses continuously sustained by the licensee." (Footnote omitted.) (A. 10).

5/ Citing Carroll Broadcasting Co. v. F.C.C., 103 U.S. App. D.C. 346, 258 F.2d 440 (1958).

In denying Westminster's "Petition to Deny," the Commission stated that "assuming arguendo that [Westminster] is in a position to request a Carroll type hearing and arguendo that the Carroll case could be extended to the facts at hand, [Westminster] has not sustained its burden."(A. 19). Aware that "exact calculation" or "pre-knowledge of the exact economics of the station" are unnecessary, Folkways Broadcasting Co. v. F.C.C., 126 U.S. App. D.C. 375 F.2d 299, (1967), (A. 19), the Commission stressed, however, that even if Westminster were hurt financially by KPAL's continued operation, as stated by this Court in Carroll, "private economic injury is in itself far from conclusive of public detriment." (A. 19).

Westminster

> makes no showing that the needs of Palm Springs would not be better served by KPAL, that there will be a degradation in the overall service . . . available to the Palm Springs area. In view of these facts, the Commission cannot make a finding that KCMJ has raised substantial and material questions of fact relevant to the public interest. (A. 19).

In dealing with Westminster's subsequent "Motion for Stay," the Commission again addressed itself to Westminster's showing. (A. 21-25). That showing, noted the Commission, amounted essentially to allegations of over-all market losses coupled with the conclusionary allegation that increased

revenues would result in upgrading the stations' personnel, equipment and public service programming. Such factors, the Commission reiterated, do not justify a hearing on a Carroll issue, and Westminster's reliance on Folkways Broadcasting Company v. F.C.C., supra, is accordingly misplaced. The question under Carroll or Folkways is simply whether there would be degradation of public service resulting from the necessary abandonment of a program or programs within a range of programs some of which would have to be abandoned.

The Commission reasoned:

> In the case before us, except for a showing that all stations in Palm Springs are operating at a loss, KCMJ's showing is limited to conclusionary allegations. Rather than a showing that there would be 'degradation of public service' resulting from abandonment of any programs, we have the speculative assertion that increased revenues (presumably resulting from the expected demise of KPAL) will enable KCMJ to upgrade its public service programming. This is certainly not a sufficient showing to require an evidentiary 'Carroll' hearing, and moreover, involves an extension of the doctrine beyond the limits of its underlying purposes, viz., to prevent diminution or destruction of existing service. (A. 23).

The Commission accordingly reaffirmed its initial grant of KPAL's transfer application and denied the requested stay. Westminster thereupon brought this appeal.

ARGUMENT

THE COMMISSION DID NOT ACT UNREASONABLY IN APPROVING THE KPAL ASSIGNMENT APPLICATION.

A. Controlling Judicial Precedent and Rational Administrative Procedure Preclude Consideration of Carroll Questions In The Context Of A License Transfer.

The fundamental question presented on appeal is whether Westminster, which has standing to oppose the KPAL assignment application,[6/] may oppose that application on the ground that it raises a Carroll question (Carroll Broadcasting Co. v. F.C.C., supra), concerning the economic ability of the Palm Springs market to support all three of the standard broadcast stations which are allocated to it. In Valley Telecasting Co., Inc. v. F.C.C., 119 U.S. App, D.C. 169, 338 F.2d 278 (1964), this Court unequivocally ruled out the possibility of raising Carroll issue allegations in the present context.[7/] "The proper time to present the economic injury issue," held the Court, "is in the proceeding concerned with the issuance of a license."

6/ Ashbacker Radio Corp. v. F.C.C., 326 U.S. 327 (1945); Camden Radio, Inc. v. F.C.C., 94 U.S. App. D.C. 312, 220 F.2d 191 (1954).

7/ See also American Federation of Musicians v. F.C.C., 123 U.S. App. D.C. 74, 356 F.2d 827 (1966); Coastal Bend Television Co. v. F.C.C., 98 U.S. App. D.C. 251, 234 F.2d 686 (1956); Gerico Investment Co. v. F.C.C., 103 U.S. App. D.C. 141, 255 F.2d 893 (1958); Mass Communicators, Inc. v. F.C.C., 105 U.S. App. D.C. 277, 266 F.2d 681, cert. denied, 361 U.S. 828 (1959).

However, "once the grant of the license is final, such matters become irrelevant, except perhaps in very unusual circumstances, 8/ until the license comes up for renewal." 119 U.S. App. D.C. 169, 170, 338 F.2d 278, 279. It is noteworthy that the Court's opinion rested solely upon the fact that a license had already issued and not on the further fact, presented by this case, of a history of service, since the license at issue in Valley was for a facility which had not yet gone on the air.

The Court's reasoning, likewise controlling here, was that while the focus of a Carroll issue is the propriety of authorizing a service--any service--in the first place, the focus of a transfer proceeding is the propriety of allowing a previously authorized service to be operated by a particular licensee. Thus, "the immediately relevant issue in this

8/ Here the Court noted (fn. 4) that "it is, of course, conceivable that the identity of a particular proposed assignee might cause the inquiry into the propriety of the assignment to encompass considerations of an economic nature not unlike those customarily encountered in a Carroll context." However, neither in Valley nor in the instant case (see Argument B, infra) did the appellant in fact raise its Carroll allegations in relation to the transferee; in both cases the appellant specifically conceded its lack of any objection addressed to the nature or qualifications of the proposed transferee.

assignment proceeding is whether the particular assignee is a proper party to hold a license." Id. In the instant case, just as in Valley Telecasting, "appellant has conceded . . . that the objections . . . it seeks leave to press upon the Commission apply to any assignee, not simply intervenor. Thus what petitioner wants to litigate now has nothing to do with this particular assignment, but, rather, with the presence in [Palm Springs] of any additional station." Id.

Nor was the Court's endorsement of the Commission's refusal to permit consideration of Carroll questions in the transfer context affected by the contention of the Valley appellant that it had failed to assert the Carroll issue at the time of grant because it had expected the permittee to be financially unable to construct a station in the first place. The Court specifically found that this was not "an adequate excuse for disrupting the normal processes of the Commission" Ibid., fn. 3. The "dilatory or disorderly presentation" which consideration of Carroll

questions in connection with a transfer entails," held the Court, "cripples any decision-making process and handicaps the agency in carrying out its function. . . . If the Commission had to consider such a collateral attack upon its original grant every time a licensee came before it, its processes would suffer seriously in both orderliness and expedition." 119 U.S. App. D.C. at 171, 338 F.2d at 280.

Nor is the correct procedure for raising Carroll questions simply a matter of administrative usage dictated by convenience. It is dictated rather by the Communications Act itself (47 U.S.C. 309(d)) which, as the Commission noted in its opinion on reconsideration in Valley Telecasting, supra, (Desert Telecasting Co., 1 Pike & Fischer, R.R. 2d 648, 651 (1963)), flatly prohibits assertion of allegations in an assignment context "which arose from the impact of the original construction permit [or license renewal] for the station and not from the assignment application attacked by the petitioner." Section 309(d) provides in pertinent part that any party in interest may file with the Commission a petition to deny any application for an instrument of authorization

involving a broadcast station at any time prior to the grant without hearing or designation for hearing thereof or during such shorter period as the Commission may by rule prescribe. This provision, an amendment of 1960, has been construed by this Court as reflecting the obvious intent on the part of the Congress "that oppositions to applications to grant construction permits [or license renewals] should be filed before the grant rather than after, as in the prior procedure." Springfield Television Broadcasting Corp. v. F.C.C., 117 U.S. App. D.C. 214, 216, 328 F.2d 186, 188 (1964).

The Act further provides in Section 405 (47 U.S.C. 405) that after a Commission order has been entered, any person aggrieved or whose interests are adversely affected thereby, may petition the Commission for rehearing and it shall be lawful for the Commission in its discretion to grant a rehearing on sufficient ground. The Section requires that the petition be filed within thirty days from the date upon which public notice of the order is given. The present raising of a Carroll challenge, which questions the impact of the long authorized operation of KCMJ, rather than that of the actually challenged transfer, manifestly makes a mockery of both these statutory provisions.

Moreover, when the authorization in connection with which Carroll should have been raised was a license renewal rather than an initial grant, the raising of such allegations in connection with a transfer application suggests a further problem: since the station to be transferred has an operational history just like its attacker, no reason appears why that station rather than its attacker, or some other nonparticipating station (of which Palm Springs has several, as noted elsewhere) is the proper station to be deleted. Surely it cannot be assumed as petitioner would have it that the attacking station's performance is superior to that of the one seeking renewal and that it is entitled therefore to ensured permanence in the allocations scheme simply because it raised the issue first.[9/]

9/ Indeed if anything were to be assumed, it might more reasonably be that if only one of a number of operating stations foresaw economic difficulties, then perhaps they were engendered simply by its unique inability to function in the face of that private economic competition which the Act seeks rather to encourage as serving the public interest than to discourage as petitioner requests. Carroll Broadcasting Co. v. F.C.C., supra; F.C.C. v. Sanders Bros. Radio Station, 309 U.S. 470, 473-476 (1940).

Yet despite the fact that this case presents a fact situation even more compelling than Valley Telecasting, wherein these principles were held controlling, and the fact that Valley Telecasting was specifically brought to the attention of Westminster in the Commission's "Opposition to Motion to Stay" (filed in this case on January 4, 1971), Westminster neither refers to nor refutes this Court's logic in that case.[10/] We submit that Valley Telecasting compels

10/ In its reply to the Commission's opposition to the request for stay, appellant dismissed the controlling Valley case as irrelevant simply because the Commission's order had not expressly relied on it and the Commission was willing to assume arguendo the theoretical applicability of a Carroll issue. However, the Commission has in the past held (Desert Telecasting Co., 1 Pike & Fischer, R.R. 2d 132) and this Court has agreed (Valley Telecasting) that as a matter of law absent unusual circumstances a Carroll issue is not relevant to a transfer situation. It cannot be assumed that the Commission was departing from this principle; on the contrary its opinion makes clear that the Commission did not accept the relevance of Carroll but grounded its discussion on an "assuming for the sake of argument" basis. In Desert itself the Commission dealt also with the merits of the claim. The significance of the discussion of the merits here, we submit, is to make clear that as in Desert no special circumstances exists which would warrant a departure from or extension of the Carroll holding. (See footnote 4 of the opinion in Valley where the Court indicated that it was "conceivable" that such circumstances could arise.)

affirmance of the Commission's order in this case. Indeed, the facts supporting the Commission's present order are in at least two significant respects stronger than those which demanded rejection of the Carroll contention in Valley Telecasting.[11/] In that case an operating television station sought to prevent the license transfer of a non-operating, only partially constructed television station, which had thus never attained operating status. Here, however, what is at stake is loss of a station with an existing fifteen year service record, a record which has been triennially up for reevaluation without challenge since 1954.

In addition to the fact that an operating station is here involved, Westminster had not one as in Valley Telecasting, but many opportunities to assert a

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11/ It is perhaps also significant that in Valley the petitioning station asserted that the challenged authorization would in fact force appellant off the air, whereas the gravamen of appellant's complaint here is really simply that its programming may not improve (see Argument B, infra).

Carroll issue, but for reasons neither apparent nor explained, it chose to delay its contest of the Commission's underlying allocations finding with respect to Palm Springs until KPAL requested the license transfer which was precipitated by the death of President, director, and principal stockholder, Mr. Maizlish. Westminster's avenues of relief were many but untried: KPAL was first authorized in 1954 and from 1956 has been providing continuous service, with one exception,[12/] to Palm Springs. Westminster's Station KCMJ, which began its operation in 1946, has been operated by appellant since 1961. KPAL has received regular renewals of its license, and its most recent application for renewal was granted in February, 1969. Westminster did not oppose this renewal, nor the other KPAL renewal which was granted after acquisition of station KCMJ, on any ground. Station KDES, the third AM station licensed to the city, began its operation in 1956 and has been granted its regular renewals without opposition from Westminster to the present time; nor has it opposed the renewals of either of its competitors. Likewise,

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12/ Due to Mr. Maizlish's death, KPAL has been silent from approximately March 24, 1969, to the present.

in 1963, after Westminster had become the licensee of KCMJ, an application for construction permit for station KGEC-FM, Palm Springs, was filed and granted without opposition by appellant. While the Commission considered these facts noteworthy in connection with appellant's assertion that its private dispute with KPAL over the KPAL site[13/] had no bearing on the filing of the petition to deny, the Commission nevertheless chose to take appellant's charges at face value and give serious consideration to the Carroll issue question rather than dismissing it procedurally or investigating the propriety of its origin. (A. 19-20).

While the untimely manner in which appellant sought to raise the Carroll question is in our view controlling, the Commission's order could thus as well be sustained by reason of the propriety of its resolution of the merits of the Carroll issue request. Accordingly, if this Court is disinclined to find that question moot on the authority of Valley Telecasting, supra, the Commission's opinion should nevertheless be affirmed for the reasons stated in the following paragraphs.

13/ This dispute concerned a rental agreement between KPAL and an associated company of appellant from which the KPAL site was leased. Since KPAL's petition to move to a new site, approved as a part of the order under appeal and originally contested by appellant, is not here challenged, the whole matter is beyond the ambit of this appeal.

B. Appellant's Factual Showing Is In Any Event Inadequate To Raise A Carroll Question With Respect To The Present Transfer.

Westminster's total failure to address the controlling premise of Desert Telecasting Co., 1 Pike & Fischer, R.R. 2d 132, reconsideration denied, 1 Pike & Fischer, R.R. 2d 648 (1963), affirmed sub nom. Valley Telecasting Co., Inc. v. F.C.C., supra, that Carroll issues do not lie as against transfer applications, is not the only dispositive failing of its appeal. Assuming arguendo that Westminster may assert a Carroll issue during KPAL's transfer proceeding, it has made no showing of how the Carroll concept can be applied to the facts of this case. It has ignored the fact that this was a transfer proceeding and not a licensing proceeding, and has relied solely on evidence designed to demonstrate that the Palm Springs market has economic problems which might militate against the initial authorization of an additional

new service.[14] It has not, however, offered any realistic suggestion that the market cannot sustain its existing services--which already include KPAL[15]--without significant public detriment, which is what all the cases in this area admittedly require. As the Commission noted the essence of Westminster's showing is the allegation, both unsupported and insufficient to raise a Carroll issue if it were supported, that silencing KPAL will increase the revenues of the other market stations and that those stations (or at least Westminster) will thereby be enabled to upgrade their

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14/ Westminster's reliance on Carroll Broadcasting Company v. F.C.C., supra; Southwestern Operating Company v. F.C.C., 122 U.S. App. D.C. 137, 351 F.2d 834 (1965); and Folkways Broadcasting Co. v. F.C.C., 126 U.S. App. D.C. 123, 375 F.2d 299 (1967), does not advance its case. They simply establish the propositions that (1) economic injury causing significant public detriment is a public interest factor to be considered in connection with new service authorizations, and (2) while a strong factual showing is prerequisite to designation of a Carroll issue, the necessarily somewhat speculative nature of the subject cannot be relied upon by the Commission as effectively barring an inquiry if the requisite strong showing has indeed been made. The issue in this case is simply whether, given these general legal principles, Westminster raised substantial and material questions demanding hearing inquiry in a factual context wholly distinguishable from those presented by Carroll and Folkways. The question on appeal is simply whether the Commission's judgment that such questions had not been raised must be held unreasonable.

15/ The fact that KPAL has been granted temporary permission to be silent pending disposition of the instant assignment application necessitated by the death of its President, director, and principal stockholder does not place this case in a Carroll context. This silence is not a normal condition for KPAL in any sense. KPAL remains a constructed and existing station with a fifteen year history of programming. And in any case, as noted earlier, the operational history would remove it from the necessary ambit of Carroll. Valley Telecasting Co. v. F.C.C., supra.

programming. Despite the fact that KPAL has been off the air since March, 1969, Westminster did not even allude to the effects of the silence, either to show consequent revenue increases or to illustrate the use of any such revenues to upgrade programs. And even if it had done so, such a showing standing alone could hardly raise a Carroll question. Even assuming it has been shown that a silent KPAL would lead to better KCMJ programs, this fact would not establish any probability that Palm Springs would be benefited thereby: what Westminster asks is that these hypothetical improvements in its programming be effectuated by wholly deleting a full schedule of service by KPAL, which has served the market well for fifteen years and whose programming service has been up for review in its last and earlier renewals as well as in this transfer proceeding without objection from Westminster or anyone else. No reason is even suggested why Carroll demands a hearing to enquire whether a full and fully satisfactory broadcast service should be taken off the air simply to facilitate a hypothetical improvement in another service.

Finally, even if Westminster had raised a question which demanded consideration, it would not be affected by the identity of KPAL's licensee and could not therefore be ground for challenging this transfer. Westminster's proper recourse, if not to await the market's next renewal, would be to seek special relief in a proceeding concerning the entire Palm Springs market, such as a rulemaking to delete a facility, at which time the Commission would have all affected parties before it. The sole question before this Court now is the qualification of assignee Moore and the record affirmatively shows even with respect to the crucial question of programming that it is at least as qualified as was the assignor. Westminster has not even alleged that KPAL's programming will hereafter be so inferior that it will be the same as no service at all, or that even were Westminster's programming to suffer, KPAL would not be able to render a fully supplemental service in terms of variety and quality of programming. Carroll Broadcasting Co. v. F.C.C., supra, 103 U.S. App. D.C. at 350, 258 F.2d at 444. Thus

Westminster has raised no possible hearing issue. It simply seeks the forbidden protection of a monopoly, a position not supported by Carroll or any other authority. 16/

CONCLUSION

Based on the foregoing, the Commission's order should be affirmed.

Respectfully submitted,

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Washington, D. C. 20554

March 24, 1971.

16/ Westminster makes much of the fact that the Commission relied on Missouri-Illinois Broadcasting Co., 3 Pike & Fischer, R.R. 2d 232 (1964), in its initial Memorandum Opinion and Order, and that if this were "error," which Westminster contends it was, the Commission could not in its later order "correct" the "error." There is no statutory provision or rule preventing the Commission from making a timely modification of an earlier order. Certainly, Westminster may not by its own inaction, or choice of a "Motion For Stay" filed with the Commission, rather than a "Petition for Reconsideration," prevent the Commission from doing so. See Poole Broadcasting Company v. F.C.C., D.C. Cir., Case Nos. 23,704 and 23,828, decided February 22, 1971; Cable TV of Santa Barbara, Inc. v. F.C.C., 928 F.2d 672, 682 (9th Cir. 1970).

BRIEF FOR INTERVENORS

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BRIEF FOR INTERVENORS KPAL BROADCASTING CORPORATION AND R. R. MOORE CORPORATION

STATEMENT OF ISSUES PRESENTED BY THIS APPEAL

The Intervenors believe that the following issue is presented by this Appeal:

Whether, under Section 309 of the Communications Act of 1934, as amended, 47 USC 309, an evidentiary hearing was required to be held before the Federal Communications Commission could find that the public interest would be served by a grant of the application to assign the license for Radio Station KPAL from KPAL Broadcasting Corporation to the R. R. Moore Corporation.

Other than action upon a motion for stay filed by the appellant herein, which motion was denied by Order of the Court dated January 18, 1971, the case has not previously been before this Court.

STATEMENT OF THE CASE

It is the understanding of the Intervenors that a full statement of the case and the background leading up to the Commission's action herein will be set forth in the Brief of the Appellee, the Federal Communications Commission. Accordingly, the Intervenors have not set forth a separate statement of the case herein.

ARGUMENT

THE COMMISSION PROPERLY CONCLUDED THAT NO HEARING WAS REQUIRED ON THE ALLEGATIONS OF THE APPELLANT THAT THE PUBLIC INTEREST WOULD BE HARMED BY ASSIGNMENT OF THE LICENSE OF RADIO STATION KPAL.

It is the understanding of the Intervenors that the Appellee intends to brief fully the main questions presented by this appeal: (1), whether a challenge may be mounted on the grounds of public harm from economic competition at the time an application for the assignment of license for an operating broadcasting station is filed before the Commission and (2), whether the action of the Commission on the merits of this case, granting the application for assignment of license without a hearing, was reasonable. Intervenors do

not feel that it will be useful to duplicate much of the argument which will be fully covered in the Appellee's brief. We wish to emphasize herein, for the Court's benefit, one aspect of the factual background relevant to the ultimate question of whether the public interest would be served by reducing the number of standard broadcast stations in the Palm Springs market from 3-2 and whether that station to be deleted should be KPAL.

In its Petition to Deny filed before the Commission, the Appellant promised to improve the quality of its programming on station KCMJ should the license for KPAL be deleted. No specific promises were made with regard to the type of programming that would be improved, what needed service would be provided which was theretofore lacking in the market, or what quantity of resources the Appellant expected to devote to its improved service. At no time did the Appellant present any facts indicating that it might be forced off the air, or that it might have to reduce the present level of its programming if the request to delete KPAL as an operating station was denied. The implicit assumption in the Appellant's request was that the public interest in Palm Springs would be best served by its station being permitted to serve the market together with the other existing standard broadcast station – Radion Station KDES.[1]

To compel a hearing on the application to assign the license of KPAL, the Appellant was under the obligation to present substantial and material questions of fact (Section 309 of the Communications Act of 1934, as amended, 47 USC 309) indicating that its extraordinary conclusion as to how the public interest would best be served in Palm Springs had some basis in fact. The nature of the facts which the Appellant might have presented could have included, for instance, the allegation that KPAL had not been, under the prior owner, serving the public interest and that the proposed assignee would not serve the public interest by its proposed service. Together with an allegation that the

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[1] KDES never filed its own objection to the assignment of license of KPAL, did not support the Appellant's request, and is not a party to this appeal.

economic competition of KPAL had rendered it difficult for the Appellant's station to maintain an appropriate level of public service, there might have been some basis to believe that an evidentiary hearing was called for in order to test the conclusion of the Appellant that its efforts to serve the Palm Springs market would be more fruitful than those of KPAL, if a choice was to be made between them, and that the net benefit from the service of two radio stations in the market would exceed whatever benefit might be obtained from the service of three stations.

At no time did the Appellant present any facts which might justify the conclusion which it urged. On the contrary, the Appellant candidly admitted that its request to the Commission was novel and unprecedented but felt that a hearing should be held merely because all stations in the market had apparently been losing money for a number of years. A hearing on *Carroll* grounds can only be held, however, when a preliminary showing has been made that public harm may come from economic competition and not merely to limit or suppress economic competition in the absence of any showing of public harm.

In fact, KPAL had been providing a useful public service to the Palm Springs market for many years and the assignee promised to significantly improve the performance of the station. In the application for assignment of license the assignee proposed to increase the hours of operation of KPAL from 126 hours to 140 hours per week. The total percentage of time as well as the absolute number of hours to be devoted to programs other than entertainment and sports (such as news, public affairs, religion, agriculture, etc.) would be increased and the assignee promised to make a significant effort to collect and broadcast local and regional news of interest to the Palm Springs market. The prior licensee of KPAL relied solely upon network news sources to obtain local news but the assignee, the R. R. Moore Corporation, indicated that all members of the station's staff, proposed to total 8 individuals, would have news collection responsibilities and one person would devote a significant portion of each working day just for this purpose. Approximately 25% of all

news to be broadcast on the station (somewhat over two hours a week) would be devoted to broadcast of matters related to local and regional events. Opposition to Petition to Deny, pp. 8-11.

None of these facts were disputed by the Appellant and it never came to grips with the question as to how the public interest could conceivably be benefited by the deletion of the service proposed by the assignee or how, or to what extent, the total service of the two remaining stations would, in sum, be able to pick up and provide as great, or greater, public benefits than the total sum which three stations would provide, with each being fully licensed to serve the market.

The Commission not unreasonably concluded that no facts had been presented which might possibly permit the conclusion that the public interest would be served by the deletion of a long-standing service whose performance would be significantly upgraded by the proposed assignee. The Commission did not require the Appellant to plead its evidence or to make the kind of showing to justify a hearing which might ultimately be presented in the hearing itself. But in order to justify instigation of the hearing requested by the Appellant, the Commission reasonably required that it be presented with some facts which would tend to support the conclusion urged by the Appellant that the public interest would be best served by deleting the facility of KPAL.

This Court has emphasized that the Commission "is entitled to insist upon more than conclusional allegations easily made and which, if accepted, entail unjustified delay and consumption of the Commission's time and energy." *Folkways Broadcasting Company v. Federal Communications Commission*, 126 U.S. App. D.C. 123, 375 F.2d at 303, and that "the temptation to an existing licensee to prolong as long as possible the advent of competition warrant special care by the Commission in the scrutiny of requests for hearing in *Carroll* circumstances." Under all the circumstances the Commission reasonably concluded that insufficient grounds had been presented to warrant a hearing. That conclusion was not merely reasonable, it was compelled.

CONCLUSION

WHEREFORE, the Order of the Federal Communications Commission of October 5, 1970, granting the application for the assignment of license of Radio Station KPAL should be affirmed.

Respectfully submitted,

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March 24, 1971

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,774

WESTMINSTER BROADCASTING CORPORATION,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

KPAL BROADCASTING CORPORATION and
R. R. MOORE CORPORATION,

Intervenors.

APPEAL FROM DECISION OF THE FEDERAL COMMUNICATIONS COMMISSION

REPLY BRIEF FOR APPELLANT

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ARGUMENT

This appeal questions whether the Federal Communications Commission erred by granting without a hearing an application for consent to the assignment of the license of radio station KPAL, and simulataneously denying a petition to deny that application. In its main brief, Westminster Broadcasting Corporation (hereinafter "Westminster") has already demonstrated that these actions by the Commission were taken on improper grounds, requiring this court

to vacate the Commission's decision of October 5, 1970 and to remand the case to the Commission.

The Brief for Appellee attempts to support the Commission's action on two grounds. It argues that Westminster's assertion of a *Carroll* issue during a license transfer proceeding was improper under *Valley Telecasting Co. v. FCC*, 119 U.S.App.D.C. 169, 338 F.2d 278 (1964). It also argues that Westminster alleged insufficient facts to raise a *Carroll* issue, and that the Commission's action in denying its petition to deny was therefore reasonable. The Brief for Intervenors adopts the Commission's arguments and separately urges affirmance of the decision below by further arguing that Westminster did not sufficiently raise a *Carroll* issue.

The adequacy of Westminster's *Carroll* showing is fully argued in the Brief for Appellant. That argument sufficently rebuts the discussions of the *Carroll* issue presented in the appellee's and intervenors' briefs, and will not be repeated here.

This court must reject the position of Commission's counsel that Westminster's assertion of an economic impact issue in this proceeding was contrary to the Commission policy upheld in *Valley Telecasting*. This position is itself improperly raised.

In *SEC v. Chenery Corporation*, 332 U.S. 194, 196 (1946), the Supreme Court recited "a simple but fundamental rule of administrative law":

> That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely on the ground invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency.

In *Burlington Truck Lines v. United States*, 371 U.S. 156, 186-9 (1962), the Court again stated that a reviewing court ". . . may not accept appellate counsel's *post hoc* rationalizations for agency action; *Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself. . . ." See also *N.L.R.B. v. Metropolitan Life Ins. Co.*, 380 U.S. 438 (1965).

Dismissal of a *Carroll*-type argument in a license transfer proceeding is not required as a matter of law. Section 310(b) of the Communications Act, 47 U.S.C. § 310(b), states that any application for assignment of license ". . .shall be disposed of as if the proposed . . . assignee were making application under section 308 for the permit or license in question. . . ." The controlling statute thus draws no distinction between points that can be considered during a transfer proceeding and during a proceeding involving grant of an original license.[1] Although *Valley Telecasting* sanctioned a Commission decision rejecting a *Carroll* issue in a transfer proceeding as being untimely raised, the Commission is not required by law to reach such a decision. Westminster recognized that it was seeking extraordinary relief, and argued before the Commission that the unique facts of the Palm Springs market, wherein *all* stations were losing money, warranted consideration of a *Carroll* issue at this time. The Commission assumed *arguendo* the appropriateness of a *Carroll* issue. Since the Commission did not consider the applicability of *Valley Telecasting*, and since application of the policy discussed in that case is discretionary, that case cannot be relied upon to uphold the Commission's decision now under appeal.

[1] The only distinction drawn by the statute is that, in acting on an application for assignment of license, ". . . the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed . . . assignee." 47 U.S.C. § 310(b). That distinction is not relevant to this case.

CONCLUSION

For the foregoing reasons and those stated in the Brief for Appellant, the Commission's decision of October 5, 1970 should be reversed. The Commission's grant of the application for assignment of license of radio station KPAL from KPAL Broadcasting Corporation to R. R. Moore Corporation should be vacated, and the case remanded to the Commission for further proceedings not inconsistent with this court's opinion.

Respectfully submitted,

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